In the Supreme Court of the United States

OCTOBER TERM, 1933.

No. 2.

JOHN FACTOR,
Petitioner,

v.

H. C. W. LAUBENHEIMER, United States Marshal, and GODFREY HAGGARD, His Britannic Majesty's Consul General,
Respondents.

BRIEF OF PETITIONER ON REARGUMENT.

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BRIEF OF PETITIONER ON REARGUMENT.

On the 29th day of May, 1933, this Court restored this case to its docket and assigned it for reargument

> "upon all questions involved, including the question whether the offense charged is an extraditable offense under the Treaty of 1889, even if the offense does not constitute a crime under the law of the State of Illinois or under any acts of Congress. The attention of counsel is directed to the interpretation placed upon Article X of the treaty of 1842 by the Secretary of State of the United States, John C. Calhoun, shortly after the ratification of the Treaty (August 7, 1844, January 28, 1845, MSS. Inst. Gr. Br.), and also to the available diplomatic correspondence relating to Article X of the Treaty of 1842 and the Treaty of 1889."

In the brief filed upon the original hearing, it was argued that an offense to be extraditable must have three characteristics: one, it must be enumerated in the treaty; two, it must be criminal by the laws of the demanding government; and three, it must be a crime for which the accused could be held for trial in the state in which he is found.

Lacking any one of these characteristics, it was pointed out that the Commissioner is without jurisdiction and all proceedings before him and warrants based thereon are void.

Conceding that the offense set out in the complaint in this case; namely, "receiving money knowing the same to have been fraudulently obtained" is added to the enumeration of offenses in Article X of the Webster-Ashburton Treaty of 1842 by the Blaine-Pauncefote Convention of 1889, and further conceding that the offense so named is made criminal by the laws of England, it was argued on behalf of petitioner that no such crime is known to the laws of the United States, by any Congressional enactment generally applicable, and that no such offense is made criminal under the laws of the State of Illinois, where the petitioner was found, and in which State proceedings looking to his extradition were instituted.

It was urged that the law, definitely and repeatedly established by this Court, requires criminality by the law of the place where the refugee is found as a prerequisite to jurisdiction in the Commissioner. Counsel for the respondents contended that the "receiving of money knowing the same to have been fraudulently obtained" is criminal under the laws of Illinois and of the United States, a contention sought to be sustained by an enumeration of statutes alleged to describe somewhat analogous offenses, and also by a reliance upon the decision of this Court in *Kelly v. Griffin*, 241 U. S. 6, but it was admitted in oral argument by counsel for the respondents that the petitioner could not have been indicted or tried in the State of Illinois, under either State or Federal law, for the offense of "receiving money knowing the same to have been fraudulently obtained" or for any offense by any other name comprising the same ingredients as the offense charged in the complaint.

In addition to this, counsel for the respondents seems to suggest that the offense charged need not be locally criminal, but the argument on this point begs the question it posits by assuming that the complaint charges "an extraditable crime" or a "treaty crime" without noting the ingredients universally held necessary constituents of such a crime.

By the order directing reargument, this Court raises the question as to whether the offense charged is an extraditable offense "even if the offense does not constitute a crime under the law of the State of Illinois or under any acts of Congress." We respectfully submit that we have heretofore shown conclusively that the offense charged is not criminal under any law in force in Illinois. We now proceed to discuss whether there can be an extraditable offense not criminal under the law of the jurisdiction in which the accused is found.

Every treaty providing for extradition enumerates specific offenses. We have been able to find no treaty between independent powers which stipulates surrender on demand, and no treaty which stipulates surrender merely upon demand supplemented by proof that the person sought has violated the laws generally of the demanding country. Uniformly and universally extradition treaties enumerate the offenses upon which such demands and surrenders shall be made. All text writers, diplomatic negotiators, and courts recognize the basis of extradition to be mutual agreement that the acts involved in the offenses enumerated are criminal; and no country has ever agreed to surrender either its own nationals or refugees seeking its asylum for a cause which is not made criminal by its own laws. The obvious purpose of enumeration of offenses in extradition treaties is to exclude the possibility of extradition for offenses not enumerated.

The classical controversy in this field grew out of a claim of the United States of a right to try a surrendered fugitive for some other offense than that upon which the surrender was made. This claim was resisted by the British Government and finally set at rest so far as the United States is concerned by this Court in the case of *United States v. Rauscher,* 119 U. S. 407, where the controversy between Mr. Fish, Secretary of State of the United States, and Lord Derby is reviewed. On pages 419 *et seq.,* Mr. Justice Miller speaking for the court, analyzes the treaty of 1842 and points out that it, in its preamble, provides for extradition for "certain offenses" and concludes that,

> "It is, therefore, very clear that this treaty did not intend to depart in this respect from the recognized public law which had prevailed in the absence of treaties, and that it was not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offenses enumerated in the treaty."

To the admirable statement of the theory and the practice of civilized nations in extradition matters so fully set out in the opinion of this Court in the *Rauscher* case, little has been added from subsequent experience. The effect of the decision is that the Treaty of 1842 not only conforms to the general international law, but conforms with the only sound principle in such matters, which is, that the specific enumeration of offenses excludes the idea of surrender or trial upon other grounds, and that the surrendering country has a right to determine, by its own local law, whether it is willing to surrender a person found within its jurisdiction for the particular and exclusive object of subjecting him to trial for a specific offense.

If the United States and the British Empire were respectively nations governed throughout by uniform systems of criminal law, there would, of course, be no difficulty

in defining offenses enumerated in an extradition treaty between them, but both the British Empire and the United States are commonwealths of nations. Neither has uniformly applicable criminal codes. Within the British Empire are self governing Dominions having legislative bodies which enact criminal codes suitable to the Dominion and having no force or application in the Empire generally. In the United States the criminal law is local to each State. There is no overriding body of national law defining crimes. As a consequence, when Great Britain and the United States make an extradition treaty and enumerate offenses for which extradition may be had, the treaty is necessarily applied in accordance with variations in the local laws. New Zealand and Canada may or may not have made criminal, within their territory, offenses which in a general way Great Britain has by treaty agreed so to regard. Illinois and New York may or may not denounce as criminal conduct which, in the same generally descriptive fashion, the United States has agreed to regard as criminal. Whether the British Parliament and the Congress of the United States might lawfully establish statutory definitions of offenses enumerated in an extradition treaty and execute the treaty on the basis of such definitions, it is immaterial to inquire. Neither country has ever attempted to do so. Both countries uniformly remit the question of criminality, both as the basis of demand and the basis of surrender, to the local law of the place where the offense is committed or where the accused is found. Every demand made by any part of the British Empire under the Treaty of 1842 or the Convention of 1889 is based upon the law of that part of the British Empire where the offense is alleged to have been committed. This is illustrated in *Collins v. Loisel*, 259 U. S. 309, where the offense charged by the demanding government was rested upon Section 420, Indian Penal Code, and the sufficiency of the offense was examined in the light of the provisions of

Section 813 of the Revised Statutes of Louisiana. It has been uniformly true, in all proceedings under the Treaty of 1842, that the demand is based upon Canadian or Indian or New Zealand or New York or Ohio local law and in every case which has come before the courts of Great Britain or her Dominions and Colonies, or of the United States, the question of surrender has been tested by the local law of the place where the accused has been found. See *In Re Anderson,* 11 Upper Canadian Common Pleas Reports 2; *In re Windsor,* 6 Best & Smith's Reports 522.

In re John Anderson, 11 Upper Canadian Pleas Report, page 2, was a case in which extradition was refused from Canada to the United States of a negro slave who had killed a man in making an escape from his master. The complaint used the expression "to stab and kill" rather than the term "murder." Referring to the complaint and warrant the Court said:

> "It did not contain a charge of murder, but merely felonious homicide. The only authority in such cases is derived from the statute passed for carrying the treaty into effect, and by that statute though power is given to judges and justices of the peace, it is given for certain specified purposes upon the face of the warrant under the rule of court in Queen's Bench it sufficiently appears that there is no jurisdiction in the province to try the person upon the charge stated. This would be an insufficient statement in an indictment for murder in any of our courts, because it is equally essential to use the original term 'murder' as it is to state that the offence was committed of malice aforethought. So much so that by the omission of either one or the other, the accused would be liable to no more than a conviction for manslaughter. But for the word 'kill' this would rather charge a malicious stabbing than any other felony, while the mere word 'kill' excludes the possibility of treating the warrant as founded on a charge of assault with intent to murder.

It is true that in a warrant the same particularity is not required as in the case of an indictment, and it is said in effect it need only contain the essential nature of the felony briefly, but this rule and the reason for it do not, in my humble judgment, govern a case like the present where the jurisdiction does not extend to all felonies nor even to all felonious homicides, but is on the contrary limited to one kind of homicide expressed by the technical word 'murder.'".

In the case of *In Re Windsor,* 6 Best & Smith's Report, page 522, the Court said:

"We have only power to surrender under statutes 6 and 7 Victoria C. 76, which does not say that all criminals are to be given up, but that for some specified crimes they may. The crimes thus specified are those defined in the treaty previously entered into by the two high contracting parties. The *charge* against the applicant is that being a clerk in a bank he did embezzle or steal a large sum of its money, that he made an entry in a book stating on his behalf that a certain quantity of specie was deposited in a vault, that statement being false. But that is not equivalent to forgery. Forgery is the false making or altering of a document to the prejudice of another, by making it appear as the document of that person. Telling a lie does not become forgery because it is reduced to writing. Here this man has not made any false statements purporting to be on behalf of any other person, but a statement purporting to be what it is. It is true the statute of New York says that such conduct shall be deemed forgery in the third degree, and observations have been made to show that the act done here was not within that statute. I am inclined, however, to think it was; but then does the New York statute saying this make him guilty of forgery within the meaning of the Extradition Act? Two very high contracting parties make a treaty on which the Extradition Act is founded; but we must construe that treaty according to the words used by them when thoroughly understood, especially when we find both peoples speaking

the same language. The meaning of the New York Statute is that the party shall be punished as if for forgery."

In this case extradition was refused because the accused was not properly charged to bring him within the offenses of the treaty provisions.

In the case of *In re Latimer,* 10 Canadian Criminal Cases, page 244, the Canadian Court said:

> "So far as the offense *charged is concerned, with which we only have to do in connection with these matters,* it is, to my mind, perfectly clear that the offense *charged in the information is one within the criminal law of Canada,* the Extradition Treaty and the criminal law of the State of Pennsylvania, which brings us to the fifth point as to whether the evidence adduced in this case substantiates, in the manner provided by statute, the charge which has been laid." (Italics ours)

In 1877, Queen Victoria appointed a Royal Commission to report generally on extradition. The Commission consisted of Lord Chief Justice Cockburn and a group of most eminent judges and lawyers of England, including Sir James Fitzjames Stevens. The Commission reported in 1878. Among the questions examined was whether "we should refuse to give up a fugitive where the offense in respect of which the surrender is asked, though an offense against the country asking it, is not an offense against our own." In Section 6 of the report, this question is answered to the effect that,

> "The English magistrate cannot be expected to know or interpret the foreign law. It is not desirable that he should be required to do more than to see that the facts proved constitute *prima facie* an offense which would have been in judicial cognizance if done in this country."

The Report of the Royal Commission was both an analysis of the existing state of the law on extradition and a

statement of the principles and reasons which ought control the British Government in the negotiation and operation of future extradition treaties. The Report was made at a time when the United States and Great Britain had long but vainly been negotiating a general treaty of extradition to replace the treaty of 1842. Indeed, negotiations between Washington and London on this subject were for a time suspended because the British Government was unwilling to proceed with the subject until the Commission's Report should be received. The effect of the Commission's Report on this subject was to hold that Great Britain had not undertaken to promise the surrender of any fugitive within its jurisdiction not subject to indictment and trial in the courts of Great Britain if the alleged offense had been there committed. After a painstaking and, we believe, exhaustive examination of the subject, we believe this to be the settled and accepted law never questioned or departed from by the British Government or any of its constituent Dominions in applications made under the Treaties of 1842 and 1889, and questioned by the United States in its proceedings under those treaties only in one early Federal case which did not reach this Court, in the correspondence of Secretary Calhoun, to which this Court has called our attention, a detailed discussion of which will follow, and in a few casual expressions in the diplomatic correspondence by Secretary Fish but not adhered to as final conclusions.

The proviso of Article X of the Treaty of 1842 out of which this question arises is to the effect that extradition shall take place,

> "only * * * upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed."

That this language is not a mere rule of evidence but applies to the definition of offenses, has been held by this Court and by all of the lower Federal courts with the single exception of *In Re Metzger*, 17 Federal Cases, p. 232, #9511, to which later reference will be made. In a footnote we list the cases in courts of the United States which, with more or less definiteness, so interpret and apply the language of the proviso.*

This Court has repeatedly and categorically held that,

> "An offense is extraditable only if the acts charged are criminal by the laws of both countries." *Collins v. Loisel*, 259 U. S. 309, at 311.

In *Pettit v. Walshe*, 194 U. S. 205, at page 217, this Court said,

> "But as there are no common law crimes of the United States, and as the crime of murder, as such, is not known to the National Government, except in places over which it may exercise exclusive jurisdiction, the better construction of the treaty is, that the required evidence as to the criminality of the charge against the accused must be such as would authorize his apprehension and commitment for trial in that State of the Union in which he is arrested."

This case is peculiarly in point and authoritative for the reason that the accused had been arrested in Indiana and

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* *In re Kaine*, 14 How. 103; *U. S. v. Rauscher*, 119 U. S. 407; *Bryant v. U. S.*, 167 U. S. 104; *In re Kelly*, 2 Lowell, 339; *In re Dugau*, 2 Lowell, 367; *Ex parte Ross*, 2 Bond, 252; *The British Prisoners*, 1 Wood & M., 66; *Ex parte Kaine*, 3 Blatch., 1; *U. S. v. Lawrence*, 13 Blatch., 295; *In re Wadge*, 15 Fed. 864; *In re Kelly*, 25 Fed. 268; 26 Fed. 852; *Ex parte Hibbs*, 26 Fed. 421; *In re McPhun*, 30 Fed. 57; *In re Charleston*, 34 Fed. 531; *In re Sternaman*, 77 Fed. 595; 80 Fed. 883; *In re Ogden*, 86 Fed. 760; *Cohn v. Jones*, 100 Fed. 639; *In re Herskovitz*, 136 Fed. 713; *Rice v. Ames*, 180 U. S. 371; *Wright v. Henkel*, 190 U. S. 45; *Pettit v. Walshe*, 194 U. S. 205; *Collins v. O'Neill*, 214 U. S. 113; *In re Breen*, 75 Fed. 458; *In re Wright*, 123 Fed. 263; *In re Frank*, 107 Fed. 272; *In re Walshe*, 125 Fed. 572; *U. S. v. Greene*, 146 Fed. 766; and *Green v. U. S.*, 154 Fed. 401.

taken to New York for hearing. It was accordingly held that the petitioner had a right to be returned to Indiana, and to have the question of his extradition determined by the laws of that State and not by the laws of New York. This question was regarded as substantially settled by *Wright v. Henkel,* 190 U. S. 40, and also by *Benson v. McMahon,* 127 U. S. 457. The opinion of this Court in *Pettit v. Walshe,* 194 U. S. 205, 218, quotes as follows from the *Benson* case:

> "When by the Law of Great Britain, and by the law of the State in which the fugitive is found, the fraudulent acts charged to have been committed are made criminal, the case comes fairly within the treaty, which otherwise would manifestly be inadequate to accomplish its purposes. And we cannot doubt that if the United States were seeking to have a person indicted for this same offence under the laws of New York extradited from Great Britain, the tribunals of Great Britain would not decline to find the offence charged to be within the treaty because the law violated was a statute of one of the States and not an act of Congress."

In *Pettit v. Walshe,* this Court was reviewing *In re Walshe,* 125 Fed. 572. In the opinion in that case, it is said by Baker, circuit judge, page 574,

> "In the recent case of *Wright v. Henkel,* 23 S. C. 781, 47 L. Ed. 948, it is very clearly determined that the representatives of the two governments in making the treaties of 1842 and 1889 had respect to the dual form of the government of the United States. Of course, the treaty-making power is with the national end of our duality, but it was competent for the national government to make the test of the existence of extraditable crimes, and to make the test of the definition of the crime depend upon the state law; and in the treaty, as the words of the treaty themselves clearly indicate, the test of the right of the British government to demand the return of an accused person was

made to rest upon the law of the place where he was found, that place being determinable by the lines of the states, districts, and territories that make up the United States; and I have no doubt that such is the situation with respect to the provinces and colonies of Great Britain, because the contracting parties referred to an accused person 'who shall seek an asylum or who shall be found within the territories of the other,' and that the return could only be had upon evidence sufficient, according to the laws of the place where the person shall be found, to justify his commitment if the offense has been committed there. And in section 5270, Rec. St. (U. S. Comp. St. 1901, p. 3391), enacted to carry the provisions of extradition treaties into effect, the magistrate referred to may, upon complaint made under oath charging any person found within the limits of any state, district, or territory with having committed within the jurisdiction of the foreign government an extraditable crime, issue his warrant, etc. So that it is absolutely clear to my mind that the one nation was not dealing with the other merely as a national entity. It was in that capacity only that they could execute the treaty, but each had regard to the situation of the other, and on the part of the British government the dual character of our institutions was very clearly recognized. We have no common-law crimes in this country. The penal code enacted by Congress is very limited. The great bulk of the crimes that are defined by the statutes are found in the penal codes of the states alone; and so, if an accused person is found in Indiana, and his return to Great Britain is demanded, the right of extradition stands upon whether or not the offense with which he *is charged is an offense under the laws of Indiana.* That is the substance of it, for it is made a condition *upon which the return may be had that the evidence of criminality shall be determined according to the law of the place where the person is found, and shall be such as would justify his commitment for trial if the crime or offense had there been committed.* Article 10 of the treaty of 1842." (Italics ours)

This explicit holding upon the point in question was affirmed by the judgment of this Court substantially upon the reasoning of Judge Baker in the court below. See also *Kelly v. Griffin*, 241 U. S. 6, where the offense alleged was a violation of the criminal code of Canada and the test was the equivalence of the law of Canada and the law of Illinois. The decision in that case was rested upon the holding that the alleged offense "is a crime by the laws of both Canada and Illinois."

In *Nielsen v. Johnson*, 279 U. S. 47, this Court held that where treaties are uncertain in their meaning, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and to their own practical construction of it, and this resort to diplomatic correspondence is not limited to the negotiations out of which the treaty grew but may be extended to correspondence subsequent to the ratification of the treaty and to actions and proceedings by the respective governments under the treaty. The Court has, therefore, in the present case directed the attention of counsel to the interpretation placed upon Article X of the Treaty of 1842 by the Secretary of State of the United States, John C. Calhoun, and also to the available diplomatic correspondence related to the Treaty of 1842 and the Convention of 1889.

In a supplemental volume, and as an appendix to this brief, we print and submit to the Court all documents and papers supplied to us by the State Department in response to a request that we be furnished every document and record in the custody of that Department bearing upon the Treaty of 1842 and the Convention of 1889. This appendix contains chronologically the documents so supplied to us or found by us in our own research in the archives of the Department. A close scrutiny of all these papers will show that with the exception of the views expressed by

Mr. Calhoun as Secretary of State, and a few casual expressions not pursued, there has been an unbroken agreement between the two governments that the language of Section X of the Treaty of 1842 has required that extradition will be granted only when the offense alleged is enumerated in the treaty and is found to be a crime by the law of that State or Dominion in which the accused is found, unless the offense is made criminal by some general law of Great Britain made applicable to its Dominions and Colonies, or by a statute of the Congress of the United States made applicable throughout all the States and Territories subject to its jurisdiction.

DIPLOMATIC CORRESPONDENCE OF 1843 TO 1845 CONSTRUING THE PROVISO IN ARTICLE X OF THE TREATY OF 1842.

The Treaty of 1842 was negotiated by Daniel Webster, the Secretary of State. In 1843, Mr. Webster was succeeded by Hugh S. Legare, and later in the same year by Abel P. Upshur, who served for the balance of 1843 and part of 1844. Mr. Calhoun succeeded Mr. Upshur and served for about a year, from 1844 to 1845.

The first case which appears in the diplomatic correspondence after the adoption of the Treaty of 1842 is that of a slave who escaped from the United States to Great Britain and who was charged with robbery. The accused was apprehended in London. Extradition was applied for and refused, apparently on the ground that copies of the indictment and bench warrant were not sufficient to justify extradition. Lord Aberdeen, Secretary of Foreign Affairs for Great Britain, took the position that the offense committed by this slave was committed while attempting to obtain his freedom, that he was entitled to his freedom, and that, therefore, the particular act of robbery did not constitute a crime under the laws of England.

Incidentally, it may be interesting to note that the growth of opinion in Great Britain on the subject of slavery had been marked and rapid. The views of Hume and Bentham, generalized as most ideas are by passing through French minds, returned to England in the form given them by Rosseau. John and Charles Wesley enveloped these ideas with a great flood of moral and religious fervor and in 1806, the British Parliament abolished the slave trade throughout the Empire. In 1835, Great Britain abolished slavery throughout her entire Empire at a cost of twenty million pounds sterling, although it was a time of peculiar financial difficulty for Great Britain. Having achieved this reform, public opinion in Great Britain, both official and lay, was zealous to vindicate the principle that the very atmosphere of Great Britain was inconsistent with the status of slavery and so when this first case arose, in which extradition of a fugitive slave was sought under the provisions of the treaty of 1842, Lord Aberdeen took the position that an act made criminal in the United States as a consequence of the slave status of the alleged offender, was not a crime in Great Britain where that status could not exist.

In Instruction No. 55, dated August 8, 1843, addressed to Mr. Edward Everett, then American minister at the Court of St. James, Secretary of State Upshur pointed out, after stating Lord Aberdeen's position, that even if the slave had a right to his freedom, the laws of England did not allow the principle involved in Lord Aberdeen's construction, which failed to draw a distinction between the intention and the motive of the act; that even by the English law, if a man intends to steal and does so, he is guilty of a crime even if he committed the act in order to attain some justifiable object. After quoting the proviso of Article X of the Treaty of 1842, Secretary Upshur continued,

> "the sole question is whether there is or is not sufficient evidence to warrant the commitment of the party, and

> this is to be determined by the laws of the country in which he may be arrested. If, therefore, the laws of England did justify robbery because it was committed in the assertion of some independent right of the party, actual or supposed, Lord Aberdeen is right, otherwise he is wrong. There is no doubt as to the decision which the law of England would pronounce on the point."

Secretary Upshur, thus protests against the British attitude as to extradition of the slave, but admits the offense charged must constitute a crime in Great Britain in order to justify the British Officers in the surrender. Thus at the very outset, under the Treaty of 1842, we find both the British Government and the Government of the United States agreeing that the language of the proviso goes to the definition of criminality by the laws of the country where the accused is found, and not merely to the sufficiency of the evidence of that which is a crime only where committed but not where found.

The British Extradition Act of 1870, IV Chitty's English Statutes (6th Ed.) 729, contains a schedule listing the crimes for which extradition will be granted by Great Britain when enumerated in a treaty, but in terms requiring "that the crimes shall be construed according to the law existing in England, or in a British possession (as the case may be), at the date of the alleged crime, whether by common law or by statute made before or after the passage of the Extradition Act." As this Act is a limitation upon the power of the executive in the British Empire to surrender, it is manifest that no general reliance upon classical definitions of offenses is relied upon, but rather the changing definitions as they may from time to time be made either in England or any of her Dominions by the appropriate legislative authority. The Treaty imposes reciprocal obligations and confers reciprocal rights. It has accordingly been recognized without question that the abo-

lition of a crime, or a change in its definition, either by an act of Parliament or by the legislative act of a British Dominion on the one hand, or by an act of Congress or a legislative act in a State of the United States, modifies *pro tanto* the operation under the Treaty itself. In other words, there is no expectation to be found in the Treaty, in the laws implementing it, or in the practice of the two governments that reliance shall be had upon some generally accepted definition of enumerated offenses constituting them "extradition offenses" and according them accepted and classical definitions. On the contrary, all of the evidence and all the practice concurs in the acceptance of definitions as they are contained in the statutes at the time of the commission of the alleged offense whether those statutes are enactments of the general government or of constituent Dominions or States.

The act of Parliament known as 6 & 7 Vict. Chapter 76, passed August 22, 1843, for many years provided the authority of British judicial officers in extradition proceedings. It was there provided that judicial officers should have the power,

> "to examine upon oath any person or persons touching the truth of such charge and upon such evidence as according to the laws of that part of Her Majesty's Dominions would justify the apprehension and committal for trial of the person so accused if the crime of which he or she shall be so accused had been there committed, it shall be lawful for such justice of the peace * * * to issue his warrant for the apprehension of such person * * *."

The first case to bring up a construction of this British Act was that of a man variously referred to in dispatches as Clinton, Britton or Reed.

In Despatch No. 75, dated January 2, 1844, Mr. Everett reported to Secretary of State Upshur that the Bow Street magistrates had refused to order the arrest of Clinton on

the ground that the original affidavits could not be received in evidence. Mr. Everett enclosed with his despatch the following documents among others relating to extradition: A1. Note from the Earl of Aberdeen to Mr. Everett dated December 2, 1843. A3. The case submitted to the attorney and solicitor general with their opinion dated November 24, 1843. These enclosures disclose the fact that an inquiry was made of the law officers by the British Government, asking for their opinion as to certain specific questions.

The first question submitted read:

> "To enable a magistrate to issue his warrant under the Act, should it not appear, that the offence charged against the party sought to be apprehended *here*, is also an offence against the laws of this country? (the words in the concluding part of the first clause of the Act—and upon such evidence as according to the laws of that part of Her Majesty's Dominions would justify the apprehension and committal for trial of a person so accused, if the crime of which he or she shall be so accused, had been there committed)."

The opinion of the law officers of the Crown upon this point was as follows:

> "The offence for which a party may be apprehended under this Act, are distinctly specified in the first section of it—they are all offences known and recognized by the criminal law of this country, and the magistrate should issue his warrant upon the same description of evidence, as he would require in case the crime had been alleged to be committed in this country."

The question was also asked whether a magistrate in England, upon having admissible evidence before him, should require evidence that the offence charged is an offence against the laws of the United States of America. The answer of the law officers of the Crown to this question was as follows:

"We think a magistrate may act upon the depositions if they would constitute a crime here without proof that the offence charged is an offence in the foreign country."

The aggrieved parties in the United States employed an eminent British solicitor, Sir John Bayley, to render an opinion upon the question of procedure under the 1842 Treaty. This opinion was furnished to Lord Aberdeen by Mr. Everett in a note dated February 20, 1844, and a copy was enclosed with Everett's Despatch No. 89 to Secretary of State Upshur, dated February 26, 1844. Solicitor Bayley disagreed with the law officers' opinion upon certain procedural questions which are unimportant here but did agree that the offence charged against the accused must be an offence under the English law when he said:

"6. I am inclined to think that an indictment brought by a grand jury and the warrant issued thereon when properly certified would be sufficient evidence of the guilt of the party accused (provided the offence charged would be similar offence in this country) to justify the committal for surrender."

In Despatch No. 139, from Mr. Everett to Mr. Calhoun dated June 3, 1844, is transmitted a note from the Earl of Aberdeen to Mr. Everett dated April 2, 1844, enclosing the opinion of the attorney and solicitor general dated April 2, 1844, commenting on the opinion and report of Sir John Bayley, above referred to, on the *Clinton* case, in which the law officers said:

"The evidence must be given before the Justice or magistrate who is called on to commit the offender; and it must be such evidence as, according to the law of this Country, would justify the apprehension and committal for trial of the party accused if the crime had been *here* committed;"

Clark on Extradition at page 131 recites the fact that Clinton's extradition was refused on this second application

on the ground that the English Extradition Act was not retrospective.

While the *Clinton* case was under consideration, in September 1843 a man named J. H. Geeren was killed in the territory of East Florida by seven negroes in the course of their efforts to escape from slavery. They succeeded in escaping and fled to Nassau in the Bahama Islands. The Grand Jury of the District of East Florida returned bills of indictment, and in a note from the Secretary of State to the British Minister at Washington, dated November 20, 1843, a request was made for their extradition. Two days later, November 22, 1843, the Minister replied transmitting the requisition for their surrender addressed to the Governor of the Bahama Islands. In Instruction No. 99 dated August 7, 1844, (one of the two instructions referred to in this Court's order reassigning the case for argument on October 9, 1933) Secretary of State Calhoun summarized the above offence and then recited that the Florida Marshal had proceeded to Nassau and,

> "on application, the Governor of the Bahamas issued his requisition to the Chief Justice of the Colony, who acting with the Associate Judges, in open Court, refused to deliver up to justice the fugitives, on the ground, that the evidence offered was not such as was required by the act of Parliament for giving up criminals, fugitives from justice, in certain cases. The Court remarked, in delivering its opinion, that: 'An indictment, *per se,* can never be received as evidence. It is not enough for us to know that the American jury thought the parties guilty. We ought to know the *grounds* upon which they thought them guilty. What may constitute the crime of murder in Florida, may be very far from doing so according to the British laws, or even to the laws of the Northern States of America. By issuing a warrant, then, to apprehend the parties, in virtue of these indictments, we might be doing so on evidence which would not justify their apprehension

by the British laws, and should thereby be proceeding in direct violation of the act.' "

Secretary Calhoun comments that there is great "feeling and excitement" in the portion of the Union affected because of the refusal of the Nassau justices to order these extraditions. He comments upon the atrocious character of the crime, states that it is a crime in Florida for a slave to kill his master in attempting to escape and that the proviso of the Tenth Article of the Treaty relates only to the evidence of an offence made criminal by the law where committed. He takes the position that,

> "the criminality of the acts charged should be judged of by the laws of the country within whose jurisdiction the act was perpetrated; but that the evidence on which the fugitive should be delivered up to justice, should be by the laws of the place where he shall be found."

He states that any other construction would "not only essentially change what is clearly specified in the body of the agreement, but make it absurd." He states that a construction which would require that the criminality of the act should be judged of by the laws of the place where it was charged to have been committed, and, at the same time, by the laws of the place where the fugitive is found is "unwarranted," and would "greatly restrict the plain meaning of the body of the agreement." He says it would limit extradition only to those "who are charged with acts constituting the crime of murder, etc. by the laws of both countries, in direct contradiction to the express provisions of the body of the agreement."

He then concludes by saying:

> "On what principle can such a distinction be made, and is the Government of Great Britain prepared to make it? I can imagine but one and that is, that the form of restraint implied under the name of

domestic servitude; that is, of one man holding another under subjection and commanding his labor without his consent, is so repugnant to the moral code, that it cannot be made lawful, although sanctioned by laws of the country where it exists. But it cannot be, that Great Britain, who is more responsible than any other country for the full extent of that form of servitude on this continent, and which has but so recently abolished it, with so little benefit to herself or those liberated, in her own possessions, is prepared to adopt and act on such a principle, and thereby place, as far as its operation may extend, this country, Russia, Spain, Brazil and all others not prepared to follow her example, in a state of national outlawry in reference to herself, against the authority of all ages, and of the great expounders of international law, and it may be added, of the Bible itself, which, as often as it is mentioned, no where discourages such servitude, or pronounces it to be repugnant to morals or religion. It cannot be, that she is prepared to adopt a principle, which, if carried out in practice, would not only be subversive of the right of one man holding in subjection and commanding the labor of another without his consent, but equally so, of one People or Nation holding another, or one portion of One People or Nation holding the other in subjection, and commanding their labor without its consent. It cannot be, but she must see, that the principle tends to the subversion of all human authority; and that it contains within itself the germ of universal anarchy; and must, if carried out in practice, react with destructive fury on her political institutions, and burst the bonds, which hold in servitude, under her subjection, so large a portion of the human race."

To understand the views expressed by Secretary Calhoun in his correspondence with Mr. Everett, it is necessary to recall that Secretary Calhoun had become the logician and defender of the pro-slavery position in the controversy then raging in the United States upon that subject. Mr. Calhoun's sincerity is not doubted by the his-

torians of the period. Both in the Senate and in the State Department, he accepted every opportunity to defend the institution of slavery and every reflection upon it was a challenge to his deep-seated convictions. Accordingly, in his instructions to Mr. Everett, he makes the traditional argument in favor of slavery that it is sanctioned alike by the laws of God and the economic and social necessities of man. His concern with the position taken by the court in the Bahama Islands was manifestly anxiety lest Great Britain,

> "who was more responsible than any other country for the full extent of that servitude on this continent, and which she has but so recently abolished, with so little benefit to herself or those liberated, in her own possessions"

was prepared to pronounce slavery to be repugnant to morals or religion. Such a pronouncement on the part of Great Britain, he regards as tending to the subversion of all human authority and containing within itself the germ of universal anarchy. It is shown by the correspondence that Lord Aberdeen regarded the holding by the court in the Bahamas, that an indictment alone did not constitute sufficient predicate, as disposing of the case; but it is equally evident that Mr. Calhoun was unwilling to let the question rest without some definite avowal on the part of the British Government that the rights of the United States under the Treaty of 1842 were not to be limited by Great Britain's enthusiasm for its recent social experiment, since those views Mr. Calhoun regarded with gloomy and prophetic forebodings.

This instruction was followed by a similar instruction from Calhoun to Everett, dated January 28, 1845, which was in response to a Despatch to Calhoun from Everett dated November 23, 1844. Everett reported that he had taken up the matter with Lord Aberdeen and that Lord

Aberdeen contended that he adopted on behalf of the Government only that part of the decision of the Court at Nassau which held that an indictment is not of itself under the Act of Parliament sufficient ground for giving up a fugitive, and that the Government was not responsible for the Nassau court saying that "what may constitute crime of murder in Florida may be very far from doing so according to the British laws or even the laws of the Northern States of America." Lord Aberdeen, however, did say that:

> "he did not, however, mean to say that in no case whatever which might arise hereafter, would the result of an application for the surrender of a fugitive charged with murder, depend in any degree upon the question whether he was a slave endeavoring to escape from his Master. By the laws of all countries the same act of killing did or did not constitute the crime of murder, according to the circumstances of the case, which were often matters of very nice discrimination, and he could very well conceive that in cases which might arise, the fact of a person's being a slave might materially affect the question of his guilt on a charge of having committed murder. Her Majesty's Government must reserve to itself the liberty of dealing with cases of this kind when they present themselves and of being governed by circumstances which cannot be foreseen nor provided for, in any general regulations."

Both the instruction of August 7, 1844 and the instruction of January 28, 1845, are foreign to the plain meaning of the language used in the Treaty and to the practical construction theretofore and thereafter placed upon it by both Governments and are further plainly inspired by the conflict of views on slavery existing between the then Secretary of State, John C. Calhoun, and the British Government. It is entirely clear that the claim made by Mr. Calhoun was regarded by him as a necessary argument in

support of the very special case which he felt called upon to make in defense of the peculiar institution of which he was the great protagonist.

In Despatch No. 250, dated January 31, 1845, Mr. Everett reported to Secretary of State Calhoun that in a note to Lord Aberdeen, dated December 26, 1844, relating the extradition case of one Kent, copy of which note was enclosed with this despatch, he had referred to the Nassau case and had presented the argument that a certified copy of the indictment for the offence should be sufficient to establish a prima facie case for extradition. In this note, Mr. Everett quoted from the opinion of John Bayley in regard to the *Clinton* case and then continued:

> "The court at Nassau in deciding that an indictment is an insufficient ground for the surrender of the fugitive, without the evidence on which it was founded, gave as a reason that what may constitute a crime in the United States may be far from being so according to British law. This reason was, as the undersigned thinks, very properly discounted by the Earl of Aberdeen in the conference above alluded to. It is a well known fact that the law of the two countries is the same in relation to the nature of all crimes provided for by the treaty; and it is an assumption against the very basis of the policy of extradition. That policy plainly rests upon the belief entertained by the contracting parties that the same acts constitute the same legal offences in the two countries. It is impossible to suppose, that the two governments would have framed the convention could there have been any reason to believe in the language of the Court at Nassau that 'what may constitute a crime of murder in Florida may be very far from doing so according to the British laws.' ".

In Despatch No. 271, dated March 3, 1845, Mr. Everett reported to Secretary of State Calhoun that in a conference a few days before with Lord Aberdeen

"I told him that I had received instructions from you again to call the attention of Her Majesty's Government to the construction of the Tenth Article of the Treaty and that I hoped he would save me the trouble of doing so by an early and satisfactory answer to my note of the 30th of January, proposing sundry amendments to the Act of Parliament. He said those amendments had been referred to the law officers of the Crown and that they were, he believed, thought favorably of, but that he had not yet got their reply."

Mr. Everett then suggested that when this report should be received he hoped the whole matter would be satisfactorily disposed of.

The construction adopted in defence of slavery by Calhoun and pressed by Everett to Lord Aberdeen, and only half answered both ways by Lord Aberdeen, was never adopted by the British Government, nor has it been followed by any Secretary of State since the time of Calhoun.

In the dispatch from Mr. Louis McLane, the new minister at the Court of St. James, to James Buchanan, as Secretary of State, dated September 3, 1845, it was stated that Lord Aberdeen was expected back from the continent the next week when the several matters requiring attention would be taken up with him, Mr. McLane remarking that the cases

"relating to the nature of the evidence required here in cases of extradition of fugitives remaining unsettled. * * * "There is also strong ground, I think, to apprehend that from the nature of the evidence which, with the design obviously, if not avowedly, of shielding colored persons, it is now altogether probable will be demanded in cases of extradition of fugitives from justice, the provision of the treaty of Washington so far as it concerns the surrender of fugitives from this country will be a nullity. It seems to be now almost certain that they will not allow the finding of an in-

dictment to be sufficient evidence even to authorize the *arrest* of the fugitive; but will require in all cases the evidence upon which the indictment was found. If a compliance with this demand were practicable, the rule itself would be a clear subversion of the object of the treaty."

On March 4, 1845, James K. Polk became President of the United States, and James Buchanan, concerned at the moment in the question of slavery, became Secretary of State. After a thorough search we can find no records in the State Department to indicate that Mr. Buchanan ever pressed further the position of Mr. Calhoun, and so far as anyone has been able to ascertain, the seven negroes in question were never extradited by the British Government to the United States and the subject was never mentioned again in any communication between the two Governments.

DIPLOMATIC CORRESPONDENCE AND PROPOSED DRAFTS OF TREATIES 1870 TO 1889.

We have not found in the archives of the Department of State any further material on the subject of extradition between the United States and Great Britain from 1845 to 1870, with the exception of one note, dated November 15, 1867, from Francis Clare Ford, of the British Embassy in Washington, to William H. Seward, then Secretary of State, transmitting to Seward, the complaint of the British Consul seeking the extradition of one Frank Sullivan for murder on the high seas. The complaint, after stating the facts, reads as follows:

"The crime of which said Frank Sullivan has so as aforesaid been guilty would justify his apprehension and commitment for trial if such crime had been committed within the said City of New York or within the southern district of New York, or the jurisdiction of the District Court of the United States for the Southern District of New York."

From this complaint we see a clear recognition on behalf of the British Government that the offence with which an accused is charged must be made criminal by some law in force in that part of the United States where the accused is apprehended.

The other communication prior to 1870 is a response to a letter from Francis Clare Ford, dated January 11, 1868, making inquiry as to the practice of the United States in regard to extradition. The response is dated January 15, 1868, and contains very little of value to the issue here presented. It does, however, recite:

> "The crimes for which extradition may be demanded are specified in the treaties upon the subject. Reciprocity in all such cases is expected, but must be secured by the treaty * * *. We are not aware of any special provisions in regard to evidence in such cases. The ordinary rules of evidence would undoubtedly be applicable."

EFFORTS TO NEGOTIATE NEW EXTRADITION TREATY 1870 TO 1877.

On October 19, 1870, Hamilton Fish, then Secretary of State, wrote a note to Sir Edward Thornton, the British Ambassador at Washington, acknowledging receipt of an amendatory act of Parliament on extradition. This amendatory act of Parliament is the present English Extradition Act of 1870. Fish acknowledged that Thornton had informed him on the authority of Earl Granville that "Her Majesty's Government are prepared to enter into arrangements with the United States subject to and within the provisions of the Act referred to."

The British Extradition Act of 1870 provided and still provides, preceding the list of crimes in the first schedule, that:

> "The following list of crimes is to be construed according to the law existing in England or any British

possession (as the case may be) at the date of the alleged crime whether by common law or by statute made before or after the passing of this Act."

On December 15, 1870, Thornton wrote to Fish and refers to a conversation which he had with Fish in October, 1870, the purport of which he informs Fish he has conveyed to Lord Granville who has instructed him to inform Fish that "the Treaty should not stipulate for extradition in cases of crimes as construed by municipal law of the two states at the time of the treaty, but as construed by British law existing at the time of their commission; otherwise, the person might be surrendered for an act not constituting a crime."

On January 27, 1871, Fish responded to Thornton's note, stating that:

"It is impossible for the United States to stipulate for the extradition of any person within their protection for crimes which may be created or changed in their definition by foreign legislation by enactment subsequent to our entering into the arrangements."

On January 30, 1871, Thornton acknowledges receipt of Mr. Fish's note of January 27, 1871, and expresses his

"opinion that the condition contained in the preamble to the list of crimes that these are to be construed according to the law existing in England, or in a British possession, at the date of the alleged crime, refers only to criminals who may be found in Her Majesty's Dominions and whose extradition may be demanded by the United States, and not to those who have fled from England and are found in this country."

On April 17, 1871, Thornton wrote Mr. Fish the following note which clearly shows the true construction placed upon the language in question by the parties:

"The Honorable
Hamilton Fish

Washington April 17th 1871

Sir,

I had the honour to forward to Lord Granville a copy of your note of the 27th of January last, in which you expressed some doubts as to the power of the Government of the United States to enter into enlarged stipulations with Her Majesty's Government relative to Extradition, owing to the provisions of the recent British 'Extradition Act 1870.' I have now received from Lord Granville a communication upon the subject, which I hope will be entirely satisfactory to you.

From your note above-mentioned it would appear that the objection taken to the Extradition Act is that 'it is impossible for the United States to stipulate for the extradition of any persons within their protection for crimes which may be created or changed in their definition by foreign legislation by enactments subsequent to our entering into the arrangements.'

Lord Granville authorizes me to say that it is a misapprehension to suppose that the British Extradition Act has such an effect. He states that the Act does not interfere with the jurisdiction or practice of the magistrates of the United States in dealing with Extradition cases, when a claim is made that a fugitive be surrendered by the Government of the United States. In such cases the magistrates in the United States would investigate the claim as they have hitherto done in accordance with the provisions of the Acts of Congress of August 1848 and June 1860. A fugitive would not, in the words of the Treaty of 1842, be surrendered, except 'upon such evidence of criminality as *according to the laws of the place where the criminal should be found,* would justify his apprehension and commitment for trial if the crime had been there committed.'

In compliance with Lord Granville's instructions I have now the honour to enclose a Draft of a Treaty

founded upon the 'Extradition Act 1870', and to inform you that it has been thought most convenient to state to the several Powers generally the views of Her Majesty's Government leaving it to each Power to suggest any amendments which it may desire. Such suggestions would be carefully considered, for Her Majesty's Government do not hold to the precise terms of the Draft; and though of course it would be more convenient if the same Treaty were to exist with all Powers, Her Majesty's Government do not exclude the idea of adapting the terms of the Treaty with each Power, as far as practicable in each instance, to the views of the other party.

At page 3 of the enclosed Draft Treaty you will find a Provision similar to that contained in the Treaty of 1842, acting under which the Magistrates in the United States, in investigating a claim for extradition, would take care to see that the crime charged was one of those named in the Treaty, and was a crime recognized by the law of the United States. It seems to Her Majesty's Government that this is an ample safeguard against the danger apprehended in your Note of the 27th of January last.

With regard to claims for surrender by the British Government, the practice will be substantially the same as it was before the Extradition Act of 1870 was passed, and English Magistrates will enquire, as they have hitherto done, whether the evidence of criminality is such as would justify a commitment for trial in England if the crime had been committed there.

The United States in 1848 set the good example of passing a general Extradition Act to give effect to existing and future Treaties, and Great Britain has followed that example by passing the Extradition Act of 1870.

There can be no reason why the two countries should not agree to an enlarged Treaty which should be applicable to all and any of the crimes named in the Schedule; and *there is nothing in the Act of 1870 which would prevent the Legislature of either country either from altering the definition of such crimes, or*

from excepting any of them from the operation of the Treaty, or which would prevent the Magistrates in either country from dealing with the cases of Extradition of Prisoners in accordance with the Law of the respective countries in existence at the time when the application for Extradition is made. For example, if a particular Act of a particular fraud constitute a criminal offence under the Bankruptcy Laws in England, which was not criminal in America, the American Magistrate would refuse to surrender the Bankrupt on application by England and vice versa.

The Act, in short, in no way interferes with the old practice, which is continued by the Draft Treaty at page 3.

Lord Granville will be glad to learn the views of the Government of the United States with regard to the enclosed Draft Treaty, merely remarking in the meantime that the exception in Article I as to the surrender of native subjects or citizens, must, as His Lordship apprehends, be omitted in a Treaty between the United States and Great Britain; for not only is the language of the two countries the same, but the admission of a plea of nationality as a bar to surrender would give rise to such difficulties as would probably neutralize the benefit of the Treaty.

I have the honor to be, with the highest consideration, Sir,

Your most obedient Humble Servant,

Edward Thornton."

(Italics ours.)

This letter was summarized sometime after June 11, 1874, for the State Department under the heading, "Memorandum as to the Negotiation for New Treaty of Extradition between the United States and Great Britain taken from Official Correspondence."

The British draft dated March, 1871, forwarded with the note of April 17, 1871, contained the following provision:

> "Provided that surrender shall be made only when in the case of a person accused the commission of the crime shall be so established as that the laws of the country where the fugitive or person so accused shall be found would justify his apprehension and commitment for trial, if the crime had been there committed."

On the margin of the draft to be found in the State Department there is a penciled note "This goes to the evidence not to the nature or definition of the crime." Also below the provision is found a penciled note "as defined by the laws of the place where the accused shall be found should be established as that said law would justify."

On April 3, 1872, Mr. Thornton informed Fish that his purpose in submitting the British draft treaty, dated March 1871, enclosed in his note of April 17, 1871, was to secure Mr. Fish's views and that he had submitted to the British Government the alterations suggested by the United States. Mr. Thornton states that Lord Granville has instructed him that:

> "He is unable to concur with you in opinion that the last paragraph of article I applies only to the laws of evidence of the country in which the criminal may be found, and that it does not require that the offence with which he is charged must be a crime by the laws of that country. According to the universal rule between nation and nation in regard to extradition, the offense with which a criminal is charged must be one against the law of the country in which he is found, as well as against the law of the country asking for his extradition. Lord Granville thinks this is the purport of the clause, but he does not object to the words proposed to be substituted, if they are more satisfactory to you."

These alterations undoubtedly are to be found in the same archives volume in the Department of State immediately following the first British draft dated March, 1871. So far as it relates to our issue, following the list of crimes the

British draft is marked out and on the margin alterations made to make the proviso read as follows:

> "Provided that the surrender shall be made only on evidence of such acts or omission as by the law of the place where the fugitive or person accused shall be found, constitute one or more of the offences hereinbefore mentioned, and are so established that such local law would justify his apprehension and commitment for trial, if the crime had been there committed; or, in the case of a person alleged to have been convicted, on such evidence as, according to the laws of the place where he is found, would prove that he had been convicted of one or more of those offences as defined by such local law."

On April 3, 1872, Thornton also reported to Fish that:

> "Lord Derby cannot concur in opinion that the last paragraph of Article I applies only to laws of evidence of the country in which the criminal may be found. The offence with which a fugitive is charged must be one against the laws of both countries."
>
> "Lord Derby also does not understand the meaning of the word 'omissions' in the passage introduced by the United States."

Immediately following the British draft, which is interlined as above indicated to make clear the American choice of language, is a printed draft of the United States, which printed draft contains the proviso exactly as marginally altered on the British draft. On the margin of this United States draft, dated March 1872, is a note that this is a copy which was discussed between Thornton and Fish on January 18, 1873; that the alterations are those proposed by Fish and discussed. Immediately following this copy of the United States draft, is another United States draft, dated March 1873, containing the same proviso as the preceding American draft. Immediately following this American draft is another American draft containing the same pro-

viso, except that there is on the margin the insert "crimes or" just preceding the word "offences."

Immediately following this American draft is another American draft containing all of the amendments suggested by Senators Edwards, Thurman, Conkling, Howe, Bayard and Caserley, and amendments by Mr. Fish marked "(F)", the notation that these amendments were all discussed by Mr. Fish in his interview with Sir Edward Thornton on January 18, 1873, and the proviso as follows:

> "Provided that the surrender shall be made only on evidence of such criminal acts as by the law of the place where the fugitive or person accused shall be found constitute one or more of the crimes or offences hereinbefore enumerated, and are so established that such local law would justify his apprehension and commitment for trial if the crime had been there committed; or, in the case of a person alleged to have been convicted, on such evidence as, according to the law of the place where he is found, would prove that he had been convicted of one or more of those offences as defined by such local law."

In March, 1873, Great Britain submitted a new draft treaty for consideration. There is also following this a United States draft of March 18, 1873, marked "conference draft" which contains a proviso in exactly the same form as the last United States draft referred to. Then appears a United States draft, dated October, 1873, the proviso reading:

> "Provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offence had there been committed."

Immediately following thereafter is a United States draft, dated October 1873. Part of this draft is in long-

hand; and part of it is evidently the printed matter of the United States October 1873 draft cut out and pasted together. The proviso in this draft is:

> "Provided that the surrender shall be made only on evidence of such acts as by the laws of the place where the fugitive or person accused shall be found constitute one or more of the crimes hereinbefore enumerated, and are so established that such local law would justify his apprehension and commitment for trial if the crime had been there committed; or, in the case of a person alleged to have been convicted on such evidence as, according to the law of the place where he is found, would prove that he had been convicted of one or more of those crimes as defined by such local law."

On October 25, 1873, Thornton advised Fish that the British Government had accepted the counter-draft of the United States, provided they would accede to some minor amendments, which so far as our problem is concerned are of no importance. Thornton advised Fish that he was enclosing the printed draft upon which modifications had been inserted. The modifications suggested in the note from Thornton to Fish are the same modifications which appear upon the last American draft referred to, and that draft is undoubtedly the one which was enclosed in the letter from Thornton to Fish, dated March 25, 1873.

On November 1, 1873, Fish wrote Thornton to favor him with additional copies of the single draft received by Fish from Thornton on October 25, 1873.

We find another United States draft treaty marked 1874, and on this draft of the treaty the proviso reads:

> "Providing this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed."

It is evident from the United States draft treaty of March, 1874, and upon the various explanations and statements of the British Government, that the language as contained in Article X of the Treaty of 1842 had exactly the same meaning as the language put in by the United States in the previous United States drafts, that the State Department concluded that there was no ambiguity in the language as used by Great Britain and the United States in the Treaty of 1842, and therefore adopted it because of its being briefer than their alternative language.

Some objections, unimportant to our problem, prepared by the State Department on May 2, 1874, were sent by Fish to Thornton on the same day. The negotiations, according to a memorandum dated May 5, 1876, signed by John L. Cadwalader, Acting Secretary of the Department of State, ended with a note from Mr. Thornton to Mr. Fish dated June 11, 1874, in which Thornton advised Fish that Lord Derby could not enter into the treaty because of the position taken by United States in relation to political offences.

In March 1876, Fish sent a despatch to Wickham Hoffman, American Ambassador at London, complaining about Great Britain's refusal to extradite a man named Winslow; he says among other things:

> "With regard to any such understanding, either expressed or implied by any authorized declaration or engagement of this Government, no evidence is adduced, none can be adduced. This Government asked the surrender of Lawrence, precisely as it has asked the surrender of all other fugitives who have been delivered by Great Britain under the Treaty of 1842, complying on its part with the requirements of the treaty; and neither by expression, nor by implication, entering into any 'arrangement'; but simply requiring the fugitive to be 'delivered up to justice.' It furnished such evidence of criminality, as according to the laws of Great Britain where the fugitive was found,

would have justified his apprehension and commitment for trial, if the crime or offense had been there committed."

At the conclusion of this despatch Fish states that,

"United States has produced such evidence of his criminality, (referring to Winslow) as according to the laws of Great Britain, would justify his apprehension and commitment for trial if the crime or offense had been committed in Great Britain."

He thereafter enters upon a discussion as to the right of the United States to try a surrendered fugitive for an offense other than the one for which he is surrendered. The United States Government took the position throughout that they had the right to try a surrendered fugitive upon another offense if they first tried him for the offense for which he was extradited. The British Government took the view that neither the United States nor Great Britain had the right to try an offender for any offense other than the one for which he was extradited. This view was later upheld by this Court in *U. S. v. Rauscher*, 119 U. S. 407. Great Britain refused to surrender Winslow unless given assurance by the United States that he would not be tried for any other offense. The whole subject is covered by the following despatches, set out in the footnote below.

Despatch No. 887 from Fish to Hoffman dated May 22, 1876.
Note from Fish to Thornton, dated May 27, 1876.
Telegram from Fish to Hoffman, dated May 27, 1876.
Note from Fish to Thornton, dated May 29, 1876.
Despatch from Derby to Thornton, dated May 29, 1876.
Despatch No. 6 from Fish to Pierrepont, dated June 21, 1876.
Note from Fish to Thornton, dated June 23, 1876.
Memorandum of conversation held June 22, 1876.
Despatch No. 904 from Fish to Hoffman, dated June 23, 1876.
Despatch No. 910 from Fish to Hoffman, dated July 13, 1876.
Despatch No. 7 from Pierrepont to Fish, dated July 20, 1876.
Telegram from Fish to Pierrepont, dated July 21, 1876.
Telegram from Fish to Pierrepont, dated July 20, 1876.
Despatch No. 11 from Pierrepont to Fish, dated July 21, 1876.

There was heated debate in Parliament on the question presented by Winslow's case and a despatch to Fish in August 1876 enclosed the speech of the Lord Chancellor in support of the Government's refusal to surrender Winslow as it appeared in "Times" of Friday, August 4, 1876, part of which is as follows:

> "The noble earl (referring to Granville) says the person must be accused of the crime, and evidence must be given which would justify his committal in this country, and if such evidence be given he is to be handed over to the United States; * * *"
>
> "On the other hand, Her Majesty's Government put this construction on their authority—they say they are ready to entertain the demand for the extradition of any person alleged to have committed any of the offences mentioned in the Treaty; they are ready to hear evidence of the criminality of the person; and if the evidence amounts to that which would justify a magistrate in committing that person for trial in this country, he is to be handed over to the Government and the Courts of the United States, * * *"
>
> "I now come to the Treaty of 1842 and to the British Act of Parliament which gave effect to it. I take the Treaty first. What does it provide? It embraces certain offences—namely, murder, assault and attempts to murder, forgery, the uttering of forged paper, piracy, robbery and arson. It takes those seven offences, and authorizes a demand and a surrender by way of extradition of any person who is accused of one of those offences provided—I speak of course with

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Notes between Derby and Pierrepont, July 16, 21, and 24, 1876.
Telegram from Pierrepont to Fish, dated July 25, 1876.
Despatch No. 14 from Pierrepont to Fish, dated July 25, 1876.
Despatch No. 13 from Fish to Pierrepont, dated August 2, 1876.
Despatch from Pierrepont to Fish, probably August 4, 1876.
Despatch No. 15 from Fish to Pierrepont, August, 1876.
Despatch No. 23 from Pierrepont to Fish, dated August 22, 1876.
Despatch No. 25 from Pierrepont to Fish, dated August 23, 1876.
Despatch No. 34 from Fish to Pierrepont, dated September 18, 1876.
Despatch No. 39 from Pierrepont to Fish, dated September 21, 1876.
Despatch No. 46 from Pierrepont to Fish, dated October 4, 1876.

regard to this country—the evidence given amounts to that which, according to British law, would justify a person's being committed in this country for trial. I ask what is the reason why seven offences out of the whole catalogue of crime are singled out, and why, also, there is this provision made that the evidence given must be such as would show a *prima facie criminality according to British law?* What is the theory which would explain why this provision was made in the Treaty? I listened with some anxiety to hear whether the noble earl (Granville) had any theory on this point. * * * Now, I venture to give my explanation. The reason why the Treaty was framed in this way is a very simple one. It is that these seven offences are agreed upon between the two countries as the *delicta majora,* about which there could be no dispute, no controversy as to whether they trench on political considerations or not. They are singled out and taken as the only crimes for which extradition is permitted; and evidence is to be given which shall show that the particular crime has been *prima facie* committed according to British law in order that this country when it surrenders a person who is alleged to be a criminal may know beforehand what is the crime, and the only crime, for which he is to be tried, and what is the character of that state of facts which is said to lead up to and indicate that it has been committed. And the moment that you pass from the offences named in the treaty and the evidence in support of those offences, and say that afterward the person surrendered may be tried for any other offence, you absolutely reduce to silence the whole of the provisions in the treaty. For what is the object of specifying one offence, and being made the judge of the evidence with regard to it, if after his trial for it, which may be a mere formality and result in an acquittal, and show that he ought never to have been accused of that offence at all, he may be tried in the country to which he is surrendered for any other offence they may please to lay at his door?"

"I find that Lord Ashburton, who negotiated the treaty, on the 9th of August, 1842, wrote to Mr. Webster and told him—what all your Lordships know—that, although the negotiators had agreed to this treaty, it could have no force against this country, except by the authority of Parliament, and therefore that the authority of Parliament must be obtained. Therefore, whatever terms the Parliament of this country imposed in the Act, by which they gave their assent to the Treaty, became part of the Treaty and governed its execution. What does the act of Parliament which was passed in 1843 say?"

"Parliament has given no authority to any Secretary of State to hand over any man within the asylum of this country to be tried for all offences whatsoever. The authority, and the only authority, given to Her Majesty's Government, is, after evidence given showing a *prima facie* case of criminality as regards the particular offence, that of handing over a person to the United States to be tried for the crime of which such person shall be so accused.'

Suffice it to say that this whole mass of exchanged correspondence gave rise to a suspension of the operation of the Treaty by the United States for some five or six months in the year 1876. Great Britain based her attitude upon information received in relation to a prior extradition case where a man by the name of Campbell had been extradited from Canada to the United States on one offense and then tried for another. The outcome of it all was that Great Britain said she had been misinformed and that Campbell had not been tried for any offence other than the one for which he was extradited and that they would extradite Winslow, but would not recede from their position that he should not be tried for any offence other than the one for which he was extradited. The United States, on its part, would not agree to give any assurances that they would not try him for some other offence, but took the position that after something was done which Great Britain considered to

be a breach of the Treaty it would be time enough for Great Britain to complain. Thereupon, the United States advised Great Britain that she considered the 1842 Treaty in full operation and effect again, and it was agreed that it should continue until a more comprehensive treaty might be entered into.

We find in the archives a draft treaty dated August, 1876, upon which appears the following notation:

> "This was handed to me by Sir Edward Thornton, October 28, 1876, informally. I agreed thus to receive it but not as a basis for negotiation nor to be considered as the draft of a proposed treaty, but only as information of the present views of the British Government—that is an aid to negotiations when they may be entered upon.
>
> Signed
> H. F."
>
> (Presumably Hamilton Fish)

The proviso in this treaty marked "United States Draft," is

> "Provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, should justify his apprehension and commitment for trial if the crime or offence had there been committed."

This draft was undoubtedly prepared by Great Britain.

On October 30, 1876, Fish wrote to Thornton that since Thornton had advised him that Great Britain would surrender Winslow that the President had indicated that the 1842 Treaty would continue in force until a new one was negotiated.*

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* The resumption of the 1842 Treaty is also disclosed by:
Instruction 49 from Fish to Pierrepont, October 31, 1876.
Telegram, dated November 1, 1876, from Fish to Pierrepont.
Despatch No. 56 from Fish to Pierrepont, dated November 3, 1876.
Despatch No. 119 from Pierrepont to Fish, dated November 16, 1876.

On November 25, 1876, Fish sent confidential instruction No. 62, in which he gives the substance of various conversations he had with Thornton and notes exchanged between them relative to putting the 1842 Treaty back into operation, with the reservation that both governments still maintain their respective positions, but that these differences be put aside by the negotiation of a new treaty.

In a telegram dated December 8, 1876, from Pierrepont to Fish, he advises that Great Britain is extremely anxious to negotiate a new treaty with the United States on account of the Winslow incident.

On December 28, 1876, Fish wrote to Thornton stating that he avails himself of the earliest opportunity to manifest the readiness and the wish of the United States to consider and conclude a new treaty which should be more comprehensive and better suited to the needs of both countries, and shall put at rest and free the subject from all questions which have heretofore arisen. Fish enclosed a new draft of the proposed treaty of extradition which he had prepared.

The proviso of this draft is as follows:

> "Provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension or commitment for trial, if the crime or offence had there been committed."

An interchange of views between Pierrepont and Fish as to why the British Government "surrendered" on the Winslow case, which are covered by the following documents:

Despatch No. 81 from Fish to Pierrepont, dated January 5, 1877.
Despatch No. 97 from Pierrepont to Fish, dated December 29, 1876.
Despatch No. 92 from Fish to Pierrepont, dated January 25, 1877.
Despatch No. 128 from Pierrepont to Fish dated February 14, 1877.

On February 23, 1877, Fish wrote to Thornton that there was but a short time remaining of the present administration, and inquiring as to the present attitude of the British Government, pointing out the danger of a recurrence of the difficulty in the Winslow case if a new treaty was not entered into without delay.

On March 3, 1877, Fish sent a note to Thornton acknowledging Thornton's note of March 3rd. in which Thornton stated that he was authorized to sign a treaty with the United States in conformity with the extradition act of 1870, and that Great Britain will offer the United States the choice of any of the treaties which have been concluded between Great Britain and any other country since the above mentioned act. Fish points out that Great Britain fails to say that they are willing to secure an Act of Parliament to allow them to enter into a treaty which will allow a fugitive to be extradited for one offence and tried for another.

On April 23, 1877, the new Secretary of State, William M. Evarts, submitted a proposed Article III providing that an extradited person might be tried for any offence enumerated in the treaty other than the one for which he was extradited provided that notice thereof be first given.

On July 27, 1877, Pierrepont sent Despatch No. 205 to Secretary of State Evarts stating that some of the British Ministry had advised that it was too late to amend the British Extradition Act at the then sitting session of Parliament, and therefore it was impossible to consider a treaty which had in it provisions requiring an Act of Parliament, such as the one in regard to trying an extradited person for an offence other than the one for which he was extradicted.

Seward acknowledged a note from Plunkett on August 7, 1877, advising that Lord Derby had stated that if the United States insisted upon a treaty which was inconsist-

ent with the English Extradition Act of 1870, they will have to consider whether Parliament will amend that Act.

On August 22, 1877, Pierrepont sent Despatch No. 221 to Evarts stating that Great Britain had appointed a commission to consider the whole subject of extradition and that probably nothing could be done about the new treaty until the commission should report. He enclosed a copy of the "Morning Post" concerning the appointment of the commission. This note was acknowledged by Acting Secretary of State Steward on September 15, 1877.

On October 25, 1877, Pierrepont advised Evarts, by Despatch No. 239, that Lord Derby had informed him that nothing could be done in relation to the new extradition treaty until the commission appointed by the British Government should make its report.

On June 22, 1878, John Walsh sent his despatch No. 100 to Secretary of State Evarts enclosing a copy of the report of the Royal Commission on Extradition. This report deals generally with the whole subject of extradition in relation to the British Extradition Act and states that Great Britain should, as a matter of policy, only enter into engagements for the surrender of persons accused of crimes which are made criminal by the laws of England. They also reported that a party should not be tried for any offence for which he is not extradited.

On January 30, 1883, L. Sackville West, British Ambassador in Washington, wrote to the then Secretary of State, Frederick T. Frelinghuysen stating that Great Britain desired a new extradition treaty and inquiring of the views of the United States in relation thereto.

On March 18, 1883, West again wrote to Frelinghuysen that Great Britain desired to speedily conclude a new treaty and that West was going to confer with Mr. Adee, the third Assistant Secretary of State, stating that Mr. Adee was

to submit a history of the unsuccessful negotiations and that he was waiting that report.

On June 28, 1883, West wrote to Frelinghuysen that Great Britain was very anxious to negotiate a new treaty, but that under the English Extradition Act of 1870 it was impossible to provide that a surrendered person might be tried for an offence other than that for which he was surrendered, and states that Great Britain will attempt to obtain an amendment to authorize such a provision and requests the United States to furnish a draft treaty containing the provision which will be agreed to in order that there should be a basis for such amendatory legislation in England.

On July 7, 1883, Frelinghuysen acknowledged West's note of the 28th, enclosing a new draft of Article Three, providing that an extradited person might be tried for any crime other than the one for which he was extradited, provided that such crime be one enumerated in the Treaty. He states that if this provision can be inserted there should be no further difficulty in concluding a new treaty.

On July 11, 1883, West acknowledged receipt of Frelinghuysen's note of July 7 and advised that he is transmitting it to the Earl of Granville, together with draft of Article Three.

On July 15, 1884, Secretary Frelinghuysen sent despatch No. 915 to James Russell Lowell, American Ambassador in London, in which he reviews at length the history of the negotiations of 1870 to 1877 and that in a conference between Ambassador West and United States representatives on April 16, 1883, it was decided to adopt Mr. Fish's draft of December 1876 on all points except Articles Three and Four (these have no relation to the problem involved here), and states that on June 29, 1883 the British Government advised that it was prepared to recommend to Parliament an amendment to the Extradition Act of 1870 so that

they could enter into a treaty which would comply with the American views as to trying persons for offences other than those for which they were surrendered. He says in relation to the Treaty of 1842:

> "While evidently deficient in its enumeration of crimes, the comprehensiveness and simplicity of the engagement and the fact that determination of the sufficiency of the charge on which extradition is sought, is left to the competency of the surrendering government, had kept its operations singularly free from friction during 42 years save as to one point resting on the domestic legislation of Great Britain in respect of which the stipulation of 1842 was silent for the simple reason that the legislature in question post dated the treaty by 28 years."

It seems of especial interest to note in connection with this despatch that the momentary controversy raised by Secretary Calhoun in 1844 had wholly disappeared from the official recollection of our State Department, for in the quotation above, the Secretary of State comments on the fact that during the forty-two years of the Treaty's operation, no friction had developed except upon the one point of the right of trial for offenses other than those upon which the demand for extradition was based, a question growing out of the British Extradition Act of 1870 and, of course, having no relation whatever to the question of criminality in the country of asylum.

On July 30, 1884, Lowell sent despatch No. 830 to Frelinghuysen covering a conference between Mr. Adee, representing the United States, and Sir Julian Pauncefote. Adee merely reported that the British government was prepared to submit to parliament an amendment to the Act of 1870.

On September 15, 1884, Frelinghuysen sent Lowell a telegram stating that the draft of the extradition treaty, with certain minor alterations (not touching on the issue

here involved) and suggested that Great Britain should propose the treaty and it should be accepted by the United States; that the United States would then sign the same.

On November 6, 1884, Frelinghuysen telegraphed Lowell that the British Ministry refused to present the amendatory legislation to the special session of Parliament then in session which were necessary before Great Britain could enter into the treaty which had been virtually agreed upon.

On June 25, July 2 and July 3, 1885, there is an exchange of telegrams between American Minister Phelps in London and Secretary of State Thomas F. Bayard in regard to the failure of the British Government to introduce the amendatory legislation in Parliament, and the information comes back that the British are not yet settled on the treaty amendments suggested by Granville, November 3, 1884. One of the suggestions of Granville is evidently to include as one of the enumerated offenses "crimes by bankrupts against bankruptcy law" and Bayard in his despatch No. 73 to Minister Phelps, dated August 4, 1885, says:

> "I am constrained to maintain the ground already taken by this Government adversely to this item. As you are aware, this country has at present no general bankruptcy law and the insolvent laws of the different states are so entirely devoid of uniformity that regularity of proceedings of demand and surrender would be next to impossible in the present state of the law. Therefore, the above item is unacceptable to this Government."

The expression "extradition is also to take place for participation in any of the aforesaid crimes, provided such participation be punishable by the laws of both contracting parties" seems to have first appeared in a draft treaty dated August 4, 1885, prepared by Ambassador West in accordance with the views of the Earl of Granville. This draft also provides:

"The extradition shall not take place before the expiration of fifteen (15) days from the committal and then only if the evidence be found sufficient according to the laws of the state applied to either to justify committal of the prisoner for trial in case the crime had been committed in the territory of said state, or to prove that the prisoner is the identical person convicted by the courts of the state which makes the requisition."

The United States evidently prepared a counter draft with no changes which bear upon our point and submitted same through Phelps, in Bayard's instruction No. 73, dated August 4, 1885. This counter draft is also dated August 4, 1885.

Upon the receipt of instruction No. 73, Mr. Phelps, himself an eminent lawyer, wrote a long and interesting reply to Secretary Bayard, dated November 23, 1885, and being despatch No. 143 from Phelps in London to Bayard in Washington. This letter contains a very careful analysis of the results so far reached in the effort to negotiate the new treaty, and discusses with great wisdom the principles which underlie engagements between nations on this subject. With regard to the suggested inclusion in the proposed treaty of offenses created by statute and having no common law antecedents, Mr. Phelps comments that many of these offenses may be known by statutes in some of the States or in some parts of the British Dominion, but not in all parts of either country, and that consequently there would arise situations in which extradition could be demanded for offenses defined by the laws of one State which would have to be denied if the offender had been found in another State where no such statute existed.

Reviewing the long and unsuccessful efforts of the two Governments to arrive at a new treaty and the multitude of controversial questions which had arisen, Mr. Phelps made the very practical suggestion that a short cut be

adopted by the formulation of a short article supplementing Article X of the Treaty of 1842 by including certain offenses which were becoming frequent but leaving all other portions of the Treaty of 1842 unchanged. Commenting upon the Treaty of 1842, Mr. Phelps says,

> "Under the treaty of 1842, now forty three years in force, no claim for extradition on either side, so far as I can learn, has failed of accomplishment in any proper case properly presented. No practical difficulty has been encountered by the Courts of either country in carrying the provisions of the treaty into effect. And no difference has occurred between the two Governments arising out of any case of extradition, except on the single question as to the right to extradite a fugitive for one offence and to try him for another. In short the treaty has completely and harmoniously answered its purpose. Surely this history does not disclose the necessity for any alteration of the existing law otherwise than to extend its provisions to certain offences which since the adoption of that treaty have become frequent and flagrant.
>
> "With France on the other hand, Great Britain has had during a part of the same period (from 1852 to 1866) an extradition treaty of a most elaborate character very similar to the draft now proposed to us. But it remained a dead letter because the requisite legislation to carry it into effect could not be obtained from Parliament. Its numerous details raising so many questions and encountering so many objections that the Bill introduced for that purpose had to be abandoned.
>
> "After fourteen years had elapsed during which no surrender of a fugitive to France had been obtained, though many had been demanded, the treaty was terminated by notice from the French Government in accordance with its stipulations.
>
> "I am quite unable to perceive what is the advantage of encumbering a treaty of this character with rules of evidence, methods of procedure, and special

conditions and limitations. If these are not enacted into the law of both countries, the treaty does not go into effect. If they are so enacted, then they need not be set forth in the treaty. If the treaty is in general terms, simply expressing the agreement, any Statute regulating extradition, on either side, not inconsistent with it, is sufficient to make the treaty operative. And can at any time be amended if found necessary. But if all these details are made a part of the treaty, then no legislation that does not exactly conform to it, is available. Thus, as I have pointed out, the British Extradition Act which has made the simple words of the American treaty completely effectual, has left the elaborate treaty with France incapable of any effect at all. * * * *

"Under the old treaty a system of legal administration has grown up, that is now understood by Courts, Counsel and Magistrates. If not altogether perfect it shares that defect with all other systems of law that have yet been devised. It has worked well enough for many years. Why should we change it? It seems to me that only necessity can justify the alteration of well settled law. All judicial experience shows that the most promising theories of legal remedy are often the most unfortunate in practical results."

On February 20, 1886, Secretary Bayard telegraphed to Phelps to obtain amendments to the Treaty of 1842 as suggested in Phelps' despatch No. 143. Phelps sent Despatch No. *223* to Bayard on *February 23, 1886,* stating that he had interviewed Lord Roseberry and submitted to him copy of draft transmitted to him in Phelps' despatch No. 143, stating that Lord Roseberry wished to omit Article *III* of the proposed draft in relation to political offenses. He states that the proviso is unnecessary because of the rule of international law subject to which all extradition treaties existing, whether it is expressed by treaty or not, no nation will surrender for political offenses.

On March 3, 1886, Bayard confirmed this telegram instructing Phelps to negotiate amendments to the Treaty of 1842 and remarks that the three additional crimes enumerated, enclosed with despatch No. 143 seemed to be sufficient for the present and states:

> "But, like you, I am averse to the inclusion of constructive or statutory offenses in the interpretation of which variance may exist under the laws of the two countries."

On June 25, 1886, Phelps telegraphed Bayard that a new extradition treaty, supplemental to the 1842 Treaty, had been signed. This treaty was never ratified by the United States Senate.

On June 26, 1886, in despatch No. 307, Mr. Phelps forwarded a copy of the new treaty as signed. The last of the four new crimes added in the draft of the treaty signed by Mr. Phelps read:

> "Malicious injury to property whereby the life of any person shall be in danger, if such injuries constitute a crime according to the laws of both the High Contracting Parties."

No further items of consequence relating to this treaty, which was not ratified by the Senate, appear in the archives so far as we are advised.

The only material relating to the actual terms arrived at in the Supplemental Convention of 1889 by Secretary of State Blaine and Lord Pauncefote are contained in English newspaper comment. The only other material relative to the Treaty of 1889 to be found in the archives of the Department of State is an exchange of correspondence between Blaine and Pauncefote regarding the date upon which the Convention would become effective.

On January 4, 1905 Secretary of State John Hay instructed Joseph H. Choate, American Ambassador, to negotiate a further amendment to the Treaty of 1842 to include

the crime of "bribery." On April 13, 1905 Ambassador Choate reported to Secretary of State Hay that the new treaty had been signed on April 12, 1905. Ambassador Choate enclosed in this report a copy of a letter which he had written to the Marquess of Lansdowne, which perhaps more clearly states the true intent and meaning of the proviso of the Treaty of 1842 than any other document to be found in the archives of the State Department. This letter is in part as follows:

American Embassy, London.
April 5th, 1905.

"My Lord,

Referring to our conversation of this afternoon in respect to difficulties suggested as to the phraseology of the Bill prepared by the Home Office to add Bribery to the list of extraditable offences, the chief of which, as I understood it, was, that our Treaty authorized by it might require the extradition of persons for some offence described as Bribery by our laws which was unknown to the English law, I beg to recall to Your Lordship's attention my note of February 11th, 1904, in which I fully discussed the subject and attempted to show that the definition of Bribery as understood by the law of England was identical with, or at least substantially resembled, the law prevailing in the United States, both by Federal and State enactments, defining Bribery, and in a Memorandum annexed to that note I gave Your Lordship a statement in detail of the various definitions of Bribery in the Statutes of the several States and in the Acts of Congress which illustrated the views which I presented, and I urged, after a careful examination of the Statutes referred to, that there is something more than a substantial resemblance between the definition of Bribery as there described, and the English definition of the crime, and speaking in a general way, I submitted that the English definition is broad and comprehensive enough to include all the American definitions, some of which are much more limited and specific in their descriptions of the offence,

so that if Bribery were added to the extraditable crimes in our Treaty, as my Government desires that it should be, it would in every practical sense be the offence which is punishable by English law as well as by American law.

Your Lordship will remember that in your note of June 6th, 1904 you offered a definition of Bribery to be inserted in the Treaty as a substitute for that which I had originally proposed. The definition which I had proposed was:—

> 'Bribery, defined to be the giving, offering or receiving of a reward to influence one in the discharge of a legal duty'

and the definition you proposed instead was:—

> 'Bribery, defined to be the offering, giving or receiving of bribes made criminal by the laws of both countries.'

In offering this Your Lordship expressed the opinion that 'Bribery alone would be sufficient for the purposes of English law,' but you suggested the addition of the words 'defined to be the offering, giving or receiving of bribes' in deference to our wish for a further definition, and of the further words 'made criminal by the laws of both countries' as the qualification already approved and in use in Article I (4) of the Convention of 1899 relating to frauds by bailees &c.

Upon an examination of the English law on the subject of Bribery I came to the conclusion that Your Lordship's proposed definition was quite as comprehensive and broad as that proposed by us and that it came practically to the same thing for extradition purposes.

Careful study of the English law satisfied me that it would hardly be possible to find a case of Bribery in any form in the United States that is not already made criminal by the laws of England. The qualification proposed by you 'made criminal by the laws of both countries' seemed to me to make the provision proposed by you entirely reciprocal and fair between the two countries and about what it should be accord-

ing to the latest exposition of the subject by the Supreme Court of the United States in the *Whitaker Wright* case. (*Wright vs. Henkel*, 190 U. S. 40).

I thought that we could hardly expect Great Britain to agree to surrender fugitives for any offence that was not Bribery made criminal by her own laws any more than you would expect us to surrender them for anything that was not Bribery made criminal by our laws.

* * * * *

According to the reasonable construction of the qualification 'made criminal by the laws of both countries' in the Treaty of 1889, as recently expounded by the Supreme Court of the United States in the *Whitaker Wright* case, absolute identity of the Statutes in the two countries defining the offence is not necessary to bring a case within the meaning of the provisions. It is sufficient if the essential character of the transaction is the same and is made criminal by both Statutes.

> 'The ordinary technicalities of criminal proceedings' says the Court 'are applicable to proceedings in Extradition only to a limited extent.'
>
> 'The general principle of international law is that in all cases of Extradition the act done on account of which Extradition is demanded must be considered a crime by both parties and as to the offence charged in this case the Treaty of 1889 embodied that principle in terms, the offence must be "Criminal by the laws of both countries".' *Wright vs. Henkel*, 190 U. S. 58.

I have no doubt that this reasonable and liberal exposition would be followed by the English Courts.

It seems also that by the Common Law of England, bribery was punishable in respect to all sorts of official persons in the discharge of their official duties, and by the British Extradition Act, the enumerated crimes are 'to be construed according to the law existing in England or in a British possession (as the case may be) at the date of the alleged crime, whether by

Common Law or by Statute made before or after the passing of this Act.'

I think therefore that Your Lordship will perceive that not only are the definitions of Bribery, as set forth in my note of February 11th, 1904, substantially to the same effect in the two countries, but also that by the settled adjudications of your own Courts and by your legal authorities there is nothing made criminal as Bribery by law in the United States that has not long ago either by Common Law or by Statute been made criminal by the laws of Great Britain.

It is clear to my mind that the difficulties suggested arising from criticisms of the Bill drawn by the Home Office are entirely removed by Your Lordship's carefully considered qualification inserted in the Treaty 'made criminal by the law of both countries.' It protects each country from the obligation to surrender fugitives charged with the crime of Bribery unless the offence as charged would be substantially criminal by its own laws.

If a fugitive from the United States were sought to be extradited from British dominions under the Treaty it would not be allowed unless the same offence in substance was found to be made criminal by the laws of Great Britain, and a fugitive from Great Britain sought to be extradited from the United States on the charge of Bribery it would not be allowed unless the same offence in substance was found to be made criminal by the laws of the United States.

It was on these grounds that I accepted Your Lordship's definition of Bribery to be inserted in the Treaty, and recommended its acceptance to my own Government, which duly approved of it.

* * * * *

I have, etc.

JOSEPH H. CHOATE."

The Most Hon.

The Marquess of Lansdowne, K.G.

A review of the entire correspondence and of the negotiations leading up to the treaties actually entered into between the United States and Great Britain as well as of the efforts to negotiate treaties which were not consummated, leads to the inescapable conclusion that both the Government of the United States and the Government of Great Britain, in these negotiations, attempted to include only offenses which were clearly criminal by the laws of both countries, and that wherever the negotiators felt some doubt as to whether an offense to be included was thus criminal by the laws of all parts of both countries, the expression was added to the denomination of the offence "made criminal by the laws of both countries" out of an abundance of caution. The proviso following the enumeration of the offenses in Article X of the Treaty of 1842 saved both countries from any possible contention that they had entered into an engagement to surrender for an offense which might not prove to be criminal in some part of their jurisdiction. The retention of this proviso in Article X of the Treaty of 1842 has continued its application to the offenses enumerated in the Convention of 1889.

SUPREME COURT CASES ON NECESSITY FOR OFFENSE BEING MADE CRIMINAL BY THE LAWS OF THE STATE WHERE THE ACCUSED IS FOUND.

The proviso in Article X of the Treaty of 1842 is to be found in every extradition treaty entered into between the United States and Great Britain, and is also to be found in all of the other extradition treaties entered into between the United States and all other nations except, for special reasons, Japan and Columbia.

The construction to be placed upon the proviso in question will not only govern the exchange of persons accused of crime between the United States and Great Britain, but will also govern the exchange of American citizens or

others accused of crime found in the United States who are sought in such countries as Turkey, Bolivia, Brazil, Argentine, Austria, Germany, Chile, Cuba, Denmark, Guatemala, Haiti, Italy and Mexico.

To adopt a construction of the proviso contrary to that placed upon it by all of the cases decided by this Court, and the inferior Federal courts with the exception of *In re Metzger*, 17 Federal Cases, 232, No. 9511, would be to violate the general principle of international law that the offense for which extradition is sought must in each instance be a crime in the place where the accused is found, as well as in the place where the offense is alleged to have been committed.* The meaning of this proviso to those who negotiated it, to those who have administered it, and to those who have considered substitutes for it in projected treaties, is indisputably clear and when draftsmen in our State Department undertook to substitute the more explicit language quoted on page 34 *supra*,

> "Provided that the surrender shall be made only on evidence of such acts or omission as by the law of the place where the fugitive or person accused shall be found, constitute one or more of the offences herein-

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* An interesting illustration of the universal acceptance among nations of the principle of criminality, in the place where the accused is found, as a prerequisite to the duty to surrender, is contained in a proposed code on extradition prepared at the instance of John Bassett Moore as a delegate to the International Commission of Jurists which met in Rio de Janeiro in July, 1912. Article 2 of that code provides in part:

> "Article 2. In order that extradition may be granted, it shall be necessary—
>
> (a) That the claimant nation have jurisdiction to prosecute and try the act on which the extradition is based.
>
> (b) That the persons demanded be guilty, as principal or accomplice, of a violation of a penal law punishable in both nations with a penalty not under two years of imprisonment."

See *Foreign Relations of the United States*, 1912, pages 18 and 37.

> before mentioned, and are so established that such local law would justify his apprehension and commitment for trial, if the crime had been there committed; or, in the case of a person alleged to have been convicted, on such evidence as, according to the laws of the place where he is found, would prove that he had been convicted of one or more of those offences as defined by such local law."

the attempt was abandoned because the authorities in both governments agreed that the proposed language meant exactly the same thing as the proviso in Article X of the Treaty of 1842, and that it was, therefore, unnecessary to adopt new language to accomplish the purpose.

That the interpretation thus given to the proviso is in accordance with the general principle of international law has been held by this Court in the case of *Wright v. Henkel,* 190 U. S. 40. In that case it is true that the offense charged under the Convention of 1889 was one which is followed by the expression "made criminal by the laws of both countries," but in the opinion in that case this was held to be merely a statement of the general principle, the court saying:

> "The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both parties * * * When by the law of Great Britain and by the law of the State in which the fugitive is found the fraudulent acts charged to have been committed are made criminal the case comes fairly within the treaty."

In the case of *Collins v. Loisel,* 259 U. S. 309, the offense charged "obtaining by false pretenses" is on all fours with the offense charged in the present case; that is, it is enumerated in the Convention of 1889 but is not followed by the expression "made criminal by the laws of both countries." In that case this Court said:

"It is true that an offence is extraditable only if the acts charged are criminal by the laws of both countries."

In the case of *Pettit v. Walshe,* 194 U. S. 205, the charge brought against the accused was murder. This is not followed by the expression "made criminal by the laws of both countries," but this Court in that case said:

"* * * the better construction of the treaty is, that the required evidence as to the criminality of the charge against the accused must be such as would authorize his apprehension and commitment for trial in that *State of the Union in which he is arrested.*"

An effort was made in that case to construe the proviso in question and the expression "made punishable by the laws of both countries" as referring to the country as a unit, but the Court specifically holds that both the proviso and the expression have reference to the state of the Union in which the accused is found, and quotes with approval from *Wright v. Henkel,* 190 U. S. 40, as follows:

"There are no common law crimes of the United States, and, indeed, in most of the States the criminal law has been recast in statutes, the common law being resorted to in aid of definition. * * * When by the law of Great Britain, and by the law of the State in which the fugitive is found, the fraudulent acts charged to have been committed are made criminal, the case comes fairly within the treaty, which otherwise would manifestly be inadequate to accomplish its purposes. And we cannot doubt that if the United States were seeking to have a person indicted for this same offence under the laws of New York extradited from Great Britain, the tribunals of Great Britain would not decline to find the offence charged to be within the treaty because the law violated was a statute of one of the States and not an act of Congress."

In *Benson v. McMahon,* 127 U. S. 457, the accused was charged with the commission of the crime of forgery. The

Mexican Treaty of 1862, under which these proceedings were taken, did not have any words following the enumerated offence "forgery," but it does contain the following proviso:

> "That this" (referring to the extradition) "shall be done only when the fact of the commission of the crime shall be so established as that the laws of the country in which the fugitive or person so accused shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed."

A great portion of the opinion of the Court in the *Benson* case is devoted to an ascertainment of whether or not the facts charged in the complaint against the accused would constitute forgery in the State of the Union in which he was apprehended.

In *Kelly v. Griffin*, 241 U. S. 6, there is a clear recognition of the principle that the offence must be a crime in the State where the accused is found. In the discussion in the opinion relating to the "perjury" charge as well as the charge of receiving public funds from a public officer who had obtained them by fraud, this principle is clearly stated. It is to be noted that perjury is not followed by the expression "made criminal by the laws of both countries." This Court there says:

> "It is objected that although perjury is mentioned as a ground for extradition in the treaty, the appellant should not be surrendered because the Canadian Criminal Code, Paragraph 170, defines perjury as covering false evidence in a judicial proceeding 'whether such evidence is material or not.' As to this it is enough to say that the assertions charged here were material in a high degree and that the treaty is not to be made a dead letter because some possible false statements might fall within the Canadian law that perhaps would not be perjury by the law of Illinois. 'It is not enough if the particular variety was criminal in both jurisdic-

tions.' *Wright v. Henkel,* 190 U. S. 40, 60, 61. There is no attempt to go beyond the principle common to both places in the present case."

The principle is also recognized in *Gluckman v. Henkel,* 221 U. S. 508; *Fernandez v. Phillips,* 268 U. S. 311; and *Wright v. Ames,* 180 U. S. 371.

In *Klein v. Mulligan,* 50 Fed. (2) 687, the Circuit Court of Appeals for the Second Circuit said:

"Under the Treaty of 1842 (8 Stat. 572, 576) as amended in 1889 (26 Stat. 1508, 1509), the crime of 'receiving any money, * * * knowing the same to have been embezzled, stolen, or fraudulently obtained' is an extraditable offense. The treaty (article 10) also provides that extradition may be had only 'upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed.' The acts charged against Klein are a crime under the laws of the state of New York (N. Y. Penal Law (Consol. Laws N. Y. c. 40) Par. 1308) as well as in England, and since they are also an extraditable offense under the treaty, commitment for extradition was proper, provided there was evidence to warrant a finding of reasonable ground to believe the accused guilty."

The Circuit Court of Appeals in the instant case said:

"It is contended for appellants that because classifications 4 and 10 alone of the ten classifications specify the requirement that the offenses therein named be criminal 'by the laws of both countries,' it follows that there is no such requirement as to the other classifications, and that in this case it is sufficient that the acts charged were criminal by the laws of England. In line with this contention it is further maintained that the above quoted provision of Article X of the Treaty of 1842 has application not to the crime itself as necessarily an offense under the laws of both countries, but only to the evidence of criminality whereby

apprehension and commitment for trial of the alleged criminal for a crime committed in the asylum country would be justified.

"However plausibly or even convincingly these contentions are supported, an insuperable obstacle to our acceptance of them is the fact that the United States Supreme Court has held otherwise. *Collins v. Loisel*, 259 U. S. 309; *Kelly v. Griffin*, 241 U. S. 6; *Wright v. Henkel*, 190 U. S. 40."

We find that there is no contrary view expressed by any Court, State or Federal, to the well-settled rule as established by this Court, the subordinate Federal Courts, and the highest courts of England, except the one case of *In re Metzger*, 17 Fed. Cas. 232, No. 9511, decided by a district judge in New York in 1847. As to the *Metzger* case, it is perhaps enough to say that while it seems by dictum to hold that the proviso in the French treaty then under consideration was limited to questions of procedure and that the French law controlled the definition of the offense, the question can hardly be held to have been there explicitly decided. In any case, this solitary exception to the uniform holding of the Federal courts in this country, including this Court, must be regarded as an early uncertainty before the practical administration of the proviso and repeated judicial decisions gave it its final interpretation otherwise. That there was at the outset some disposition to question the meaning of the proviso is stated by *John Bassett Moore* in the first volume in his *Treatise on Extradition*, §344, but in 1891, when Moore's book was written, he regarded this early attempt as not having prevailed. This, of course, was long in advance of the cases in this Court which in terms establish the law of the place where found as affording the test of criminality, and likewise hold local criminality an indispensable requisite of jurisdiction.

CONCLUSION.

It is respectfully submitted:

One: That the United States has not in the Treaties of 1842 and 1889, nor in any other treaty, ever undertaken to surrender an accused except for specified offenses.

Two: That the general principles of international law affecting extradition require criminality under the law of the place where the accused is found as a prerequisite to jurisdiction to surrender.

Three: That the Treaty of 1842 and the Convention of 1889, as uniformly interpreted by the British Government and by our Government, with the exceptions discussed, recognize the law of the place where the accused is found as the basis of the definition of the crime in determining local criminality, without which jurisdiction does not exist.

Four: That while there have been extraditions under the Treaty of 1842 based upon Federal statutes operative throughout the entire territory of the United States, all extraditions resting upon an alleged offense not defined by a Federal statute of general application have been tested by an application of the law of the State where the accused is found.

Five: That the uniform practice in extradition between the United States and Great Britain has been a comparison of the law of the State or Dominion in which the offense is alleged to have been committed with the law of the State or Dominion in which the accused is found, and that there is no case in which a surrender has been even asked by either government without a recognition of the right of the government upon which the demand is made to determine, according to its local law, whether the offense charged is there made criminal.

Whether or not the time is approaching, or has come, when executive departments of nations might with propriety enter into engagements of a more general kind need not

be here discussed. They have not done so. The resolute determination of both Great Britain and the United States not to extradite persons found within their borders for political offenses, and not to have the machinery of extradition perverted into a collection agency for private debts has been made clear. Both countries insist upon safeguarding the duty of extradition. The safeguards imposed have consisted of: first, a definite enumeration of specific offenses for which, and for which alone, extradition will be granted; second, the passage of enabling acts in both countries which limit the operation of the treaties; third, recognition by both Great Britain and the United States of the composite character of their national territorial jurisdictions which has led to a uniform practice on the part of both countries to tender, as the basis for a demand, an accusation of an offense against a local law, as for instance, India, or Canada, or New York, or Ohio, and the corresponding practice of testing the duty to surrender by the local penal law of the Province, Dominion, State, or Territory in which the accused is found.

No other procedure has, as yet, been seriously considered by our Government or by the Government of Great Britain, and as a matter of judicial inquiry, it is respectfully submitted that the question is not only not at large, but is determined by decisions of this Court and of the Courts of Great Britain and her Dominions.

Respectfully submitted,

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